
IN THE SUPREME COURT OF MISSOURI

Furlong Companies, Inc.

Circuit Court No. 00CV210725

Plaintiff

Respondent,

vs.

Court of Appeals No. W.D. 63248

Supreme Court No. SC 86741

Court of Appeals, Western District

City of Kansas City, Missouri

Circuit Court for Jackson County

Defendant

Appellant.

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
DIVISION NO. 14
HONORABLE JUSTINE E. DEL MURO, CIRCUIT JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

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FURLONG COMPANIES, INC.**

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STATEMENT OF FACTS

A. Procedural Background

This matter arises out of the City of Kansas City's (hereinafter "City") denial of a subdivision/preliminary plat application submitted by Furlong Companies, Inc. ("Furlong"). Legal File ("LF"), pp. 9-13. Furlong was ultimately forced to file suit, in accordance with the Missouri Administrative Procedures Act ("MAPA"), on May 5, 2000 in Jackson County Circuit Court in response to the City's decision to deny his preliminary plat application. LF, pg. 1; Transcript ("Tr."), pg. 3. Furlong's Petition and Amended Petition sought an order of Mandamus, pursuant to Mo. Rev. Stat. section 536.150.1, compelling the City to approve his plat application (Tr., pg. 3), and sought damages pursuant to 42 U.S.C. § 1983. LF, pp. 8-13.

After hearing evidence on Furlong's Mandamus claim, pursuant to Mo. Rev. Stat. §536.150.1, the trial court entered its order compelling the City to approve Furlong's plat application immediately and without undue delay. LF, pp. 40-41. In doing so, the trial court expressly found that the City's action in denying Furlong's preliminary plat application was "unlawful, unreasonable, arbitrary and capricious in that Respondent [City] failed to perform its ministerial duty, given that this Court finds that Relators [Furlong] met the Subdivision Regulations and the preliminary plat is consistent with the zoning ordinance." LF, pp. 40-41. The trial court also found that the City never conveyed any reasons to Furlong for denying the plat application and never afforded Furlong an opportunity to present

a revised plat to reflect the actual changes that were agreed to by Furlong to conform to the “conditions” recommended by the City. LF, pg. 41. Finally, the trial court expressly rejected the City’s reliance (during the pendency of the litigation) upon the “general purposes” provisions of the City’s Subdivision Regulations, noting that “the Court is mindful that Respondent at no time provided Relator with any clear or articulated reasons for denial of the preliminary plat. To suggest violations of various general provisions of Subdivision Regulations without being more specific is specious.” LF, pg. 41. Consequently, the Court entered its order of Mandamus against the City on November 29, 2000. LF, pg. 41.

The trial court subsequently heard evidence on Furlong’s additional claims for damages pursuant to 42 U.S.C. § 1983. Following the evidence adduced, the trial court found that the City’s conduct with respect to the Furlong plat application “demonstrates a stark and glaring deviation from the standard practices and procedure followed by the City. . .” LF, pg. 44. The trial court noted that when “[v]iewed against the backdrop of the City’s consistent pattern and practice of approving preliminary plats, the conduct of the City as it relates to Relator was clearly atypical.” LF, pg. 46. The court found that “Relator was subject to unreasonable delays and required to fulfill conditions in advance of approval without further explanation.” LF, pg. 46. It concluded that “the City’s decision appears to have been motivated by sources that are not to be considered when approving a preliminary plat.” LF, pg. 46. Accordingly, the trial court found that

“the city’s conduct [was] more than a mere violation of the law” and, thus, rose “to the level of truly irrational.” LF, pg. 46. After reviewing the evidence regarding damages, the trial court awarded Furlong \$224,871.00 in actual damages (LF, pg. 47), along with \$148,435.20 in attorneys fees. LF, pg. 63.

B. Furlong’s Property and the Plat Application

Furlong Companies, Inc. (“Furlong”) is a Missouri corporation solely owned and operated by Mr. Mike Furlong. Transcript (“Tr.”) pp. 485-86. Furlong is the owner of certain real property located in Kansas City, Jackson County, Missouri on the north side of Red Bridge Road, approximately 400 feet west of Holmes Road (the “Property”). Exhibit 29, Joint Stipulation of Facts and Documents, ¶ 1; Ex. 29-A. The Property is located in an area of the City which is zoned C-3a2, Intermediate Business, High Buildings, and comprises approximately 2.76 acres. Ex. 29, ¶ 2; Ex. 29-B; Ex. 29-C. Mr. Furlong established the Furlong Companies, Inc. to purchase and develop the Property. Tr., pg. 486. As part of Furlong’s plan, it intended to subdivide the Property into three lots for development. Tr., pp. 66, 488.

Sections 89.300 *et seq.*, RSMo set forth the procedures and mechanisms by which Missouri cities may govern the subdividing of land. Ex. 29, ¶ 4. Chapter 66 of the Code of Ordinances of the City of Kansas City, Missouri (the “Code”) contains the rules and regulations regarding the subdivision of land located in the City (the “Subdivision Regulations”). Ex. 29, ¶ 5; Ex. 29-E.

On October 1, 1999 Furlong filed with the City Development Department of the City (“City Staff”) an application for approval of a preliminary plat for the Property (the “preliminary plat application”). Ex. 29, ¶ 6. Olsson Associates, an engineering company employing engineers and land surveyors licensed in the State of Missouri (“Olsson”), on behalf of Furlong, prepared the preliminary plat application (as well as the respective plat) and signed the application as Furlong’s representative. Id. at ¶ 8, Tr. 67-68. Michael J. Furlong, on behalf of Furlong, also signed the Preliminary Plat Application. Id. at Tr., pg. 67. The Preliminary Plat Application was assigned case number SD6982. Ex. 29, ¶ 6.

A copy of the preliminary plat application, including the preliminary plat submitted therewith, was admitted into evidence as Exhibit 29-F. The preliminary plat application either contained or included the following:

- a. The subdivision name;
- b. The applicant’s name, address, and telephone number;
- c. The name, address, and telephone number of the firm preparing the plat;
- d. The name, address, and telephone number of the Property owner;
- e. The name, address, and telephone number of the developer;
- f. The name, address, and telephone number of the person to whom all correspondence was to be directed;
- g. The general location of the Property;

- h. The legal description of the Property;
- i. The existing zoning district within which the Property lay;
- j. The proposed zoning district within which the Property lay;
- k. Representations that the Property would contain three (3) lots and comprised 2.76 acres;
- l. A representation by the applicant that the applicant believed that no variances or exceptions would be required for the plat as well as a representation that the applicant would elect to prepare the final plat immediately following the Plat Review Committee's favorable recommendation;
- m. The requisite filing fee;
- n. Eighteen copies of the plat folded so as to fit within an 8½ x 14 case file;
- o. An 8½ by 11 transparency of the plat; and
- p. The signature of the Property owner.

Ex. 29, ¶ 7; Ex. 29-F. In addition to the above-referenced requirements of Chapter 66 of the Code, the preliminary plat needed to satisfy the requirements of §§ 66-81(a)(1)-(6) of the Subdivision Regulations. Specifically, it should:

- a. Comply in all respects with all applicable provisions of the state statutes;
- b. Comply in all respects with the City zoning ordinance and building and housing codes, and all other applicable laws;

- c. Comply in all respects with the City's master plan, applicable major street plans, public utilities plans and capital improvements program of the city, including all streets, drainage systems and parks shown on the major street plan or official master plan as adopted;
- d. Comply in all respects with all special requirements of Chapter 66, Code of Ordinances, City of Kansas City, Missouri, and any adopted policies and rules of the department of health, the department of finance, the department of public works, the pollution control department, and the department of natural resources of the state adopted pursuant to any law or ordinance;
- e. Comply in all respects with the rules of the state highways and transportation department since the Property abutted a state highway or connecting street; and
- f. Comply in all respects with the standards and regulations adopted by the director of public works and all boards, commissions, departments, divisions, agencies and officials of the city adopted pursuant to any law or ordinance.

Ex. 29, ¶ 17. Olsson also included within the preliminary plat dated October 12, 1999 information including the location and boundaries of individual parcels of

land subdivided into lots, and, where applicable, included streets, alleys, easements, street grades, etc. Ex. 29, ¶ 10, Tr. pp. 464-465.

In addition, the preliminary plat, drawn to scale, was submitted with the preliminary plat application in compliance with the requirements of § 445.020, RSMo and therefore either contained or included the following:

- a. A scale noted on the face of the plat;
- b. Writing on the face of the plat including its title as well as the block, section, and United States survey, or part thereof, it purports to represent;
- c. The Property's position relative to the remainder of the block, section, or United States Survey; and
- d. Platting of all section, quarter section, or United States Survey lines which intersect the Property done in such a manner that the precise location of the land purported to be platted can be determined on inspecting the plat.

Ex. 29, ¶17.

Based upon all of the content of Furlong's application, as well as his accession to the City's standard conditions, Furlong's preliminary plat complied with all requirements of the Subdivision Regulations. Tr., pp. 24-25, 51-52, 228.

C. The City's Decision-Making Process

On November 3, 1999, Furlong and Olsson met with the City's Plats Review Committee to receive comments on the preliminary plat. The Plats

Review Committee thereafter indicated its recommended conditions of approval of the preliminary plat. Ex. 29, ¶12. Furlong made all revisions as requested by the Plats Review Committee. Tr., pp. 186-187; Ex. 29, ¶ 19.

On December 7, 1999 City Staff recommended to the City Plan Commission (the “Plan Commission”) that it approve the preliminary plat application, subject to certain standard and customary conditions. Tr., pp 24, 51, 333; Ex. 29, ¶15; Ex. 29-I. Specifically, City Staff recommended approval of the Preliminary Plat subject to the following eleven (11) conditions:

- a. That six (6) copies of a revised Preliminary Plat and one 8½ x 11’ acetate be submitted prior to an ordinance request showing:
 - i. A proposed cross access easement through proposed Lot 2 to the east line of Lot 2;
 - ii. Approved driveway details and dimensions approved by Parks & Recreation;
 - iii. A fifteen (15) foot building and paving setback from the North line;
 - iv. The extension of an eight (8) foot-wide median and any necessary widening to the main entrance from Red Bridge Road in order to provide two (2) twelve (12) foot-wide exit lanes and one (1) twelve (12) foot-wide

entrance lane to the first proposed curb cuts to serve proposed Lots 1 and 3; and

- v. The elimination of an easterly drive on proposed Lot 3.
- b. That Furlong cause the area to be platted and processed in accordance with Chapter 66 of the Code of Ordinances (the Subdivision Regulations);
- c. That Furlong submit a storm drainage study to the City Engineer's Office for approval and that Furlong make any necessary improvements as required by the City Engineer's Office;
- d. That Furlong submit plans for grading and siltation and erosion control to the City Engineer's Office for approval prior to beginning any construction activities;
- e. That Furlong obtain a Land Disturbance Permit from the City's Department of Public Works ("Public Works") prior to beginning any construction, grading, clearing or grubbing activities;
- f. That a variance to the maximum allowable lot width to depth ratio of 1:3 be granted for proposed Lot 2 as shown on the Preliminary Plat;
- g. That Furlong enter into an agreement to contribute to the I-435/103rd Street Corridor Study (the "Corridor Study") prior

to the recording of the plat for contribution based on
\$2,160.00 per bay and \$8.00 per square foot of restaurant;

- h. That Furlong construct five (5) foot-wide sidewalks on the North side of Red Bridge Road as required by Public Works and Parks & Recreation;
- i. That Furlong submit covenants, conditions, and restrictions to the City's Law Department for approval of the detention tract with the Final Plat;
- j. That Furlong enter into an agreement to improve the North half of Red Bridge Road prior to approval of the Final Plat;
and
- k. That Furlong extend sanitary sewers as required by Public Works.

Ex. 29, ¶18. In Kansas City's administrative process, all preliminary plat applications typically have such standard conditions attached as part of approval. Tr., pp. 35, 333.

On December 7, 1999, the Plan Commission conducted a hearing to determine the preliminary plat's compliance with the Subdivision Regulations. Ex. 29, ¶16. During the Plan Commission hearing on December 7, 1999, Olsson and Furlong agreed to all of the standard conditions of approval for the preliminary plat, as set forth in the City Staff Report. Ex. 29, ¶19. At the Plan Commission hearing, there was no sworn testimony taken, nor was Furlong

provided with the opportunity to confront and cross examine witnesses. Tr., pp. 80-81; 538-539. There was no formal record of the Plan Commission's decision-making process, and no formal written decision, with specific findings or conclusions, was issued. Tr., pg. 81. Notwithstanding City Staff's prior recommendation of approval, the Plan Commission voted to deny the Preliminary Plat. Tr., pg. 81. The City Plan Commission did not tell Furlong why it was denying the application. Tr., pp. 81, 538-39.

On January 7, 2000, in accordance with Code § 66-43(g), Furlong requested, in a letter to Virginia Walsh, City Planner, that "you submit my plan to the City Council." Ex. 29, ¶21. Consequently, on January 21, 2000, Robert L. Langekamp, Acting Director of the City Development Department, submitted to the City Clerk a "Request for Ordinance/Resolution" in which he requested that an ordinance to approve the preliminary plat be docketed for consideration by the Council of the City of Kansas City (the "City Council"). Ex. 29, ¶22.

On February 3, 2000, Ordinance No. 000144 was introduced to the City Council for first reading. Ex. 29, ¶23.

In the meantime, following the Plan Commission's decision, Furlong attempted to find out from the City why the plat application had been denied, but no one would tell him what was wrong or why his application was denied. Tr., pp. 544, 549, 567. Although he attempted to discuss the matter further with Ms. Walsh (on more than one occasion) (Tr., pp. 112-113, 115), Mr. Furlong was told that she would not tell him if his plat application complied with the Subdivision

Regulations “for fear of litigation.” Tr., pg. 115. When Furlong attempted to submit a revised preliminary plat, which reflected compliance with the previously-accepted conditions, Ms. Walsh refused to accept it, stating that it was not necessary. Tr., pp. 110, 131, 161, 544, and 567.

Subsequently, on March 1, 2000, the Planning, Zoning & Economic Development Committee of the City Council (the “P&Z Committee”)¹ held a public hearing regarding Ordinance No. 000144, which sought approval of the preliminary plat. Ex. 29, ¶24. During the hearing, Furlong handed to the members of the P&Z Committee a copy of a petition (“Petition 1”) signed by the owners of property located adjacent to or near the Property indicating their understanding of Furlong’s plans to develop the Property, memorializing Furlong’s agreements with them, and attesting to the fact that they maintained no objection to Furlong’s request to subdivide the Property. Ex. 29, ¶26; Ex. 29-Q. Furlong also handed to the members of the P&Z Committee a copy of a second petition (“Petition 2”) signed by the tenants of Red Bridge Shopping Center, located near the Property, indicating their understanding of Furlong’s plans to subdivide the Property, build a car wash, and have two fast food restaurants, and attesting to the fact that they supported Furlong’s plans to develop the Property. Ex. 29, ¶27; Ex. 29-R. Following the public hearing, the Committee went into

¹ The P&Z Committee is a committee comprised of city councilpersons and acts as an advisory/recommending committee to the full City Council. Tr., pg. 746.

closed session. Tr., pp. 117, 525. The P&Z Committee then voted to continue consideration of Ordinance No. 000144 until March 8, 2000., Tr. pg. 117.

On March 8, 2000, based upon testimony of nearby residents, the P&Z Committee expressed concerns about potential increases in traffic volume and flow created by the development proposed by Furlong and requested that Furlong and the City's Public Works Department ("Public Works") meet in the next week to determine the level of traffic study needed. Ex. 29, ¶ 26. The P&Z Committee then continued consideration of Ordinance No. 0001444 until March 15, 2000, so that a traffic study could be conducted. Ex. 29, ¶26; Ex. 29-Q.

The traffic impact study required of Furlong by the P&Z Committee had not been previously requested by City Staff or the Plan Commission. Ex. 29, ¶29. Nonetheless, Furlong engaged George Butler Associates, Inc. to prepare a traffic study for the Property ("Traffic Study 1"). Ex. 29, ¶30; Ex. 29-T. Furlong prepared this comprehensive study at great expense. Tr., pp. 568-569; Ex. 108.

On March 15, 2000, Furlong appeared before the P&Z Committee and presented the conclusions of Traffic Study 1. Tr., pp. 566-567. During the hearing, Mr. Mohsin Zaidi, one of the City's chief traffic engineers, stated that he needed additional information and requested additional time to examine and review Traffic Study 1. Ex. 29, ¶32. Accordingly, the P&Z Committee continued consideration of Ordinance No. 000144 until March 29, 2000. Ex. 29, ¶32.

On March 29, 2000, Furlong provided City Staff and the P&Z Committee with a revised, more comprehensive traffic study prepared by George Butler

Associates, Inc. (“Traffic Study 2”). Ex. 29, ¶33; Ex. 29-V. The conclusion of Traffic Study 2 provides that “additional traffic from the proposed development will have little impact on the existing traffic system. The capacity analyses indicate that the existing street system and traffic control systems will handle the traffic from the proposed [uses].” Ex. 29, ¶34; Ex. 29-V, pg. 6. During that fourth hearing, the P&Z Committee again considered Ordinance No. 000144 and heard testimony from the City’s Transportation Services Manger, Mr. Mohsin Zaidi. Ex. 29, ¶35. Mr. Zaidi concurred with the conclusions of Traffic Study 2, stating that in his opinion development of the Property would have no significant impact on traffic within the vicinity of the Property. Ex. 29, ¶35; Tr., p. 58. At the conclusion of the public hearing, the P&Z Committee again held a closed session regarding Ordinance No. 0001444. Ex. 29, ¶36. After returning from closed session, the P&Z Committee voted to continue Ordinance No. 000144 “off the Committee’s docket.” Ex. 29, ¶37. By putting the Ordinance off the Committee’s docket, the Ordinance would not be reviewed again for up to six (6) months. Tr., p. 762.

Rule 28 of the Rules of the City Council (“Rule 28”) provides that should an ordinance not be reported by a committee within twenty (20) days after the date it is referenced to the committee, any member of the City Council may call the document out of committee by notifying the clerk and president in open session. Ex. 29, ¶38.

On April 13, 2000, Kansas City Councilman Ed Ford, Chairman of the P&Z Committee, called Ordinance NO. 0001444 out of P&Z Committee for docketing before the entire City Council for second reading. Ex. 29, ¶39. During that period of time, Councilman Ford commented publicly that there was no legal basis to reject the plat. Tr., pp. 772-73. Councilman Ford also stated that the City's legal counsel had informed various Council members that there was no legal basis to reject Furlong's application, and that such information was conveyed during the closed session of the P&Z Committee on March 29, 2000. Tr., pg. 776.

On May 4, 2000, by a vote of 9 to 4, the City Council voted to not approve Furlong's Preliminary Plat and Ordinance No. 000144. Ex. 29, ¶40; Ex. 29-Y. Neither Furlong nor the public generally were advised of a formal hearing date on Furlong's application/Ordinance. Tr., pp. 120-122, 526. Furlong was not allowed to cross examine witnesses. In fact no witnesses were even heard, and no evidence was adduced, prior to the formal decision by the full City Council on May 4, 2000. Tr., pg. 122. Although the City Council voted to fail the Ordinance on Furlong's plat application, there was no formal written decision, nor were there findings of fact or conclusions of law articulated to Furlong. Tr., pg. 122.

At trial, Furlong presented evidence regarding the City's practice and history with respect to preliminary plat applications. Of the 197 preliminary plat applications submitted to the City during the period from 1990 to 2002, only the Furlong plat application was denied. Ex. 95-99. All of the other plat applications, including those that also involved commercial property zoned as C-3a2, were

approved with little or no delay, and all contained standard conditions, similar to those recommended for the Furlong Plat. Ex. 95-99, 112-118. Moreover, in the seven other preliminary plat applications pertaining to similarly-zoned commercial property, none during the twelve year period reviewed involved the City Council or its recommending committees going into closed session to discuss the application. Tr., pg. 714. None of those applicants were required to conduct a traffic study. Tr., pg. 715.

POINTS RELIED UPON

- I. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT FAILS TO COMPLY WITH RULE 84.04(c) IN THAT IT CONTAINS AN ARGUMENTATIVE AND INCOMPLETE STATEMENT OF FACTS AND DOES NOT PROPERLY DETAIL THE RECORD ON APPEAL.**

Dors v. Wulff, 522 S.W.2d 325, 326 (Mo. App. 1975)

Evans v. Groves Iron Works, 982 S.W.2d 760 (Mo. App. 1998)

Stickley v. Auto Credit, Inc., 53 S.W.3d 560, 562 (Mo. App. 2001)

Perkel v. Stringfellow, 19 S.W.3d 141, 146 (Mo. App. 2000)

Rule 84.04(c)

- II. THIS APPEAL SHOULD BE DISMISSED AS IT FAILS TO COMPLY WITH RULE 84.04(i) IN THAT THE “ARGUMENT” SECTION FAILS TO PROPERLY REFER TO THE RECORD ON APPEAL.**

Henderson v. Fields, 68 S.W.3d 455 (Mo. App. 2001)

Stickley v. Auto Credit, Inc., 53 S.W.3d 560, 562 (Mo. App. 2001)

Williams v. Williams, 55 S.W.3d 405, 417 (Mo. App. 2001)

Rule 84.04(i)

17 Mo. Prac. § 84.04-10 (2nd Ed.)(2003)

- III. THE TRIAL COURT CORRECTLY GRANTED ITS WRIT OF MANDAMUS AFTER ENGAGING IN A *DE NOVO* REVIEW OF**

THE EVIDENCE PERTAINING TO THE CITY’S DECISION TO DENY FURLONG’S PLAT APPLICATION BECAUSE THE DECISION WAS A “NON CONTESTED CASE” UNDER MAPA IN THAT THE CITY’S ADMINISTRATIVE PROCESS WAS NOT ONE IN WHICH THE APPLICANT’S RIGHTS WERE REQUIRED BY LAW TO BE DETERMINED AFTER AND AS A RESULT OF THE HEARING PROCESS AND FURTHER LACKED ANY INDICIA OF PROCEDURAL FORMALITY.

(APPELLANT’S FIRST POINT)

City of Richmond Heights v. Bd. of Equalization, 586 S.W.2d 338, 342-43 (Mo. banc. 1979)

Hagely v. Bd. of Ed., 841 S.W.2d 663, 669 (Mo. banc 1992)

McCoy v. Caldwell County, 145 S.W.3d 427 (Mo. 2004)

Schaefer v. Cleveland, 847 S.W.2d 867, 872-73 (Mo. App. 1993)

Mo. Rev. Stat. § 536.010(2)(2005)

IV. THIS COURT SHOULD DISMISS THE CITY’S APPEAL OR, AT LEAST, POINT II OF ITS APPEAL BECAUSE IT FAILS TO COMPLY WITH RULE 83.08(b) IN THAT APPELLANT SEEKS TO RAISE AN ADDITIONAL ARGUMENT/ISSUE NOT PREVIOUSLY RAISED IN ITS ORIGINAL BRIEF AND IN THAT THERE WAS UNQUESTIONABLY SUBSTANTIAL EVIDENCE TO SUPPORT

**THE TRIAL COURT’S FINDING THAT THE CITY ACTED IN AN
“ARBITRARY AND CAPRICIOUS” MANNER.**

Blackstone v. Kohn, 994 S.W.2d 947, 953 (Mo. 1999)

Linzenni v. Hoffman, 937 S.W.2d 723 (Mo. 1997)

(APPELLANT’S SECOND POINT)

- V. THE TRIAL COURT CORRECTLY ENTERED JUDGMENT ON
FURLONG’S CLAIM FOR DEPRIVATION OF SUBSTANTIVE
DUE PROCESS RIGHTS BECAUSE THERE WAS SUBSTANTIAL
EVIDENCE TO SUPPORT THE TRIAL COURT’S FINDING THAT
THE CITY ACTED IN A “TRULY IRRATIONAL” MANNER IN
THAT THE EVIDENCE DEMONSTRATED THAT THE CITY’S
FUNCTION IN REVIEWING FURLONG’S PLAT WAS PURELY
MINISTERIAL AND THAT ITS CONDUCT IN THIS CASE WAS
TRULY IRRATIONAL, UNLAWFUL, GROSSLY ATYPICAL, AND
PRETEXTUAL.**

(APPELLANT’S THIRD POINT)

Bituminous Materials. Inc. v. Rice County, Minnesota 126 F.3d 1068, 1070
(8th Cir. 1997)

Chesterfield Development Corp. v. City of Chesterfield, 963 F.2d 1102,
1104 (8th Cir. 1992)

Frison v. City of Pagedale, 897 S.W.2d 129 (Mo. App. 1995)

Woodwind Estates Ltd. v. Gretkowski, 205 F.3d 118, 123 (3rd Cir. 2000)

U.S. Const., Amendment XIV, Section 1

42 U.S.C. § 1983

VI. THE TRIAL COURT CORRECTLY ENTERED JUDGMENT IN FURLONG'S FAVOR BECAUSE FURLONG SUBMITTED SUBSTANTIAL EVIDENCE OF PROXIMATELY-CAUSED DAMAGES UNDER 42 U.S.C. § 1983 ARISING FROM THE CITY'S VIOLATION OF FURLONG'S SUBSTANTIVE DUE PROCESS RIGHTS.

(APPELLANT'S FOURTH POINT)

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT FAILS TO COMPLY WITH RULE 84.04(c) IN THAT IT CONTAINS AN ARGUMENTATIVE AND INCOMPLETE STATEMENT OF FACTS AND DOES NOT PROPERLY DETAIL THE RECORD ON APPEAL.

This appeal should be dismissed because the City's statement of facts is argumentative and incomplete. It contains a slanted statement of facts that wholly fails to refer to any evidence tending to support the judgment in this case. In failing to comply with Rule 84.04(c) appellant has preserved nothing for review, and this Court should, accordingly, dismiss its appeal.

Rule 84.04 provides, in part:

(c) Statement of Facts. The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument. Such statement of facts may be followed by a resume of the testimony of each witness relevant to the points presented.

The purpose of the requirements pertaining to the statement of facts is to define the scope of the controversy and to afford the appellate court an immediate, accurate, complete, and unbiased understanding of the facts of the case. Stickley v. Auto Credit, Inc., 53 S.W.3d 560, 562 (Mo. App. 2001)(citing Perkel v. Stringfellow, 19 S.W.3d 141, 146 (Mo. App. 2000)).

The Statement of Facts should include a complete recitation of the facts established, not merely those facts that are helpful to the appellant. *See Evans v. Groves Iron Works*, 982 S.W.2d 760 (Mo. App. 1998) (holding that omission of evidence supportive to one's adversary's position is inconsistent with 84.04(c) and fails to preserve anything for appellate review); 17 Mo.Prac. § 84.04-6 (2nd Ed.) (2003) (same). Those facts proffered must be supported by appropriate and specific page references to the appellate record. Rule 84.04(i) (2004). A proper statement of facts is critical, as it permits the appellate court to quickly and accurately find where the record supports particular statements. *Dors v. Wulff*, 522 S.W.2d 325, 326 (Mo. App. 1975).

Failure to conform the Statement of Facts to the requirements of Rule 84.04(c) constitutes grounds for dismissal, as it requires the appellate court to become an advocate and to independently scour the record to fully understand the issues. *Stickley, supra* at 562.

Appellant's Statement of Facts is quite simply argumentative and improper, insofar as it fails to include much of the evidence presented to, and ultimately accepted by, the trial court. Curiously, the appellant's Statement of Facts contains absolutely no reference to any of the evidence **supporting** the factual determinations expressly made by the trial court below.² Apparently, appellant

² Moreover, respondent is compelled to point out that many of appellant's page references within the Statement of Facts are simply not supportive of the purported

would have this Court believe that the trial court ruled from “whole cloth.” Rather than reciting a detailed account of the appellant’s omissions from the record, respondent respectfully refers the Court to Respondent’s Statement of Facts, which more accurately and completely sets forth the evidence adduced at the trial court below. Nevertheless, in light of the wholly argumentative nature of appellant’s Statement of Facts, respondent respectfully submits that this appeal should be dismissed, as it preserves nothing for review.

II. THIS APPEAL SHOULD BE DISMISSED AS IT FAILS TO COMPLY WITH RULE 84.04(i) IN THAT THE “ARGUMENT” SECTION FAILS TO PROPERLY REFER TO THE RECORD ON APPEAL.

“facts” set forth. For instance, appellant suggests that “Furlong failed to submit a revised preliminary plat, as requested by City staff.” Appellant’s brief, pg. 4. As support for such a “fact,” the City refers to page 131 of the Transcript. However, that reference does not, in any way, suggest that the City staff requested the submission of a revised plat. In point of fact, Furlong expressly inquired about such a revised plat and was informed by City staff that it was not necessary. Tr., pp. 110, 131, 161, 544, and 567. The trial court made an express finding on this point. LF, pg. 41. As such, appellant’s statement is nothing more than biased argument. This deficiency constitutes an additional basis for dismissal.

Appellant further compounds its errors by failing to comply with Rule 84.04(i), which requires that the argument section of a party's brief contain specific and frequent reference to the record on appeal. In fact, there is virtually no reference whatsoever to the record on appeal within the entirety of appellant's Argument section. Given this additional deficiency, respondent submits that appellant's brief preserves nothing for review and should be dismissed.

Rule 84.04(i) provides:

(i) Page References in Briefs. All statements of fact and argument shall have specific page references to the legal file or the transcript.

Consequently, the requirement to set forth specific reference to the record on appeal is mandatory. 17 Mo. Prac. § 84.04-10 (2nd Ed.)(2003). A failure to refer to specific page references preserves nothing for review. Henderson v. Fields, 68 S.W.3d 455 (Mo. App. 2001); Williams v. Williams, 55 S.W.3d 405, 417 (Mo. App. 2001).

Appellant further disregarded Missouri appellate procedure when it wholly failed to provide any specific page references to the record on appeal. Appellant's argument section begins on page ten of its brief. From that point forward, there is but one solitary reference to the record on appeal. *See* Appellant's Brief, pp. 10-24. While appellant occasionally refers to statements that it attributes as "evidence" adduced at the trial court level, there is absolutely no reference whatsoever to guide this Court in ascertaining where the purported evidence lies within the appellate record before it. Such omissions leave this Court in the

untenable and inappropriate position of having to scour the appellate record to determine the actual status of the proof adduced. This it cannot properly do. *See Stickley v. Auto Credit, Inc., supra.* Respondent respectfully submits that appellant has, consequently, preserved nothing for review. As such, appellant's appeal should be dismissed for failure to comply with, amongst others, Rule 84.04(i).

III. THE TRIAL COURT CORRECTLY GRANTED ITS WRIT OF MANDAMUS AFTER ENGAGING IN A *DE NOVO* REVIEW OF THE EVIDENCE PERTAINING TO THE CITY'S DECISION TO DENY FURLONG'S PLAT APPLICATION BECAUSE THE DECISION WAS A "NON CONTESTED CASE" UNDER MAPA IN THAT THE CITY'S ADMINISTRATIVE PROCESS WAS NOT ONE IN WHICH THE APPLICANT'S RIGHTS WERE REQUIRED BY LAW TO BE DETERMINED AFTER AND AS A RESULT OF THE HEARING PROCESS AND FURTHER LACKED ANY INDICIA OF PROCEDURAL FORMALITY.

(APPELLANT'S FIRST POINT)

A. STANDARD OF REVIEW

The standard of review for a bench-tried case is well-established. An appellate court must affirm the trial court's decision unless the judgment is unsupported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32

(Mo. banc 1976). Behen v. Elliott, 791 S.W.2d 475, 476 (Mo. App. 1990). The evidence and all reasonable inferences drawn therefrom must be viewed in the light most favorable to the trial court's judgment, and all contrary evidence and inferences must be disregarded. Wildflower Community Ass'n Inc. v. Rinderknecht, 25 S.W.3d 530, 534 (Mo. App. 2000). Moreover, an appellate court must give deference to the trial court's opportunity to observe the witnesses while testifying, assess their credibility, and weigh their sincerity of character. Luketich v. Goedecke, Wood & Co., Inc., 835 S.W.2d 504, 507 (Mo. App. 1992), Pinnell v. Jacobs, 873 S.W.2d 925, 927 (Mo. App. 1994).

**B. THE MAPA APPLIES TO THE CITY'S ADJUDICATION OF
PLAT APPLICATIONS SUCH AS FURLONG'S.**

The Missouri Administrative Procedures Act (MAPA) generally sets forth the statutory requirements and mechanisms pertaining to those governmental functions that are traditionally considered "administrative" in nature. The term "administrative" is frequently characterized as involving the functions and activities of the executive branch of government. 20A Mo.Prac. § 3.01 (2004). These functions are not limited solely to state executive agencies and, instead, often include county and municipal local officers or bodies. Id. Consequently, Missouri courts have long held that MAPA applies not only to administrative decisions emanating from state agencies but also to those generated by local governmental bodies enacted by "constitutional provision, statute, municipal charter provision, or ordinance." *See, e.g.* State ex rel. Young v. City of St.

Charles, 977 S.W.2d 503, 504 (Mo. 1998); *see also* Wrenn v. City of Kansas City, 908 S.W.2d 747, 749 (Mo. App. 1995).

The instant case unquestionably falls within the purview of MAPA, as the City Council is a municipal administrative body enacted and empowered “by law” to perform traditionally executive functions, such as the land-use decision at issue in this matter. As a result, the City’s plat-application review process falls squarely within the purview of MAPA and is reviewable accordingly. As detailed below, Furlong respectfully submits that the applicable review provision is that pertaining to “non-contested” cases-Mo. Rev. Stat. § 536.150.1.³

**C. THE CITY’S ADJUDICATION PROCESS CONSTITUTES A
“NON-CONTESTED CASE” UNDER MAPA, AS DEFINED
BY MO. REV. STAT. § 536.150.1.**

The definition of a “contested case” under MAPA is set forth in Mo. Rev. Stat. section 536.010(2). Specifically, it is defined as:

“a proceeding before an agency in which legal rights, duties, or privileges of specific parties **are required by law to be determined after hearing.**” Mo. Rev. Stat. § 536.010(2) (2005)(emphasis added).

³ Contrary to the suggestions raised by Amicus Curiae, the Missouri Municipal League, Furlong has always maintained that this matter was one of judicial review under MAPA. See Tr., pg 3. To the extent that the Amicus brief suggests otherwise, it is simply incorrect.

If a particular administrative proceeding, whether through a state or local body, does not fall with the statutory definition of a “contested case,” then it is necessarily deemed a “non-contested case.” *See* Mo. Rev. Stat. § 536.150 (2004); Hagely v. Bd. of Ed., 841 S.W.2d 663, 669 (Mo. banc 1992).

The “law” referenced in the definition of “contested case” is generally understood to refer to any statute, constitutional provision, or ordinance that mandates a formal hearing. Byrd v. Board of Curators of Lincoln University of Missouri, 863 S.W.2d 873, 875 (Mo. 1993). As such, if there is no statutory, constitutional, or municipal requirement that a decision be made after (and as a result of) a formal hearing, then the matter cannot qualify as a “contested case.” *See* McCoy v. Caldwell County, 145 S.W.3d 427 (Mo. 2004); Mo. Rev. Stat. § 536.010(2) (2004)(defining “contested case”) .

Of note, the legal requirement for a hearing must be more than a mere passing and/or gratuitous reference to a “hearing” in order for an agency process to constitute a “contested case.”⁴ In other words, mere gratuitous reference to a “hearing,” without more, does not convert an informal agency process into a full blown “contested case.” In fact, this Court has recently held that the mere statutory reference to a “hearing” is insufficient to render an administrative

⁴ Indeed, as some appellate courts have previously noted, “some noncontested cases may have some gratuitous procedural formality.” Herron v. Kempker, 2003 WL 22478741 (Mo. App. 2003).

process a “contested case.” McCoy v. Caldwell County, 145 S.W.3d 427 (Mo. 2004).

In McCoy, the Court was asked to determine whether a particular administrative review/termination procedure employed by the Caldwell County Sheriff’s department constituted a “contested case” under MAPA. The Court initially noted that the governing statute for termination/disciplinary proceedings against deputy sheriffs expressly references a “hearing” as part of the review process. Id. at 428. That statute, Mo. Rev. Stat. section 57.275.1, states in part:

“the deputy sheriff may request a hearing. . . . The hearing shall take place before the hearing board to be appointed by the sheriff. The sheriff shall schedule a closed hearing . . . A written report of the facts determined during the hearing shall be forwarded to the sheriff.” Id. (citing Mo.Rev.Stat. § 57.275.1).

Despite the unambiguous reference to such a “hearing” requirement during the administrative process, this Court held that the sheriff’s decision did not constitute a “contested case” because there was no express requirement within the statute that that deputy’s rights be determined at the hearing as a result of the information garnered therein. Id. at 428-29. The Court noted that the sheriff maintained full decision-making authority, in spite of the “hearing” requirement, and that the decision was not dependent upon the “hearing” in any way. Id. Consequently, the Court concluded that the matter was not a “contested case,” even in spite of a

statutorily-referenced “hearing,” because no rights, duties or privileges were required to be determined at that “hearing.” Id.

In the instant case-much like the McCoy case, Furlong respectfully submits that the City’s review process for plat applications simply does not qualify as a “contested case” under MAPA because there is (and was) no legally-required proceeding in which rights are required to be determined after and as a result of a mandated hearing. Furlong is unaware of any statutory or constitutional requirement that the City’s consideration of a plat application be formulated after and as a result of a formal hearing, and there is simply no evidence in the appellate record before this Court to reach such a conclusion. Instead, the Court of Appeals noted reference in the record to a “hearing” discussed within section 66-43 of the Kansas City Code and concluded that “these ordinances appear to clearly require a hearing to be held.”⁵ Opinion, pg. 11. This prior appellate Opinion, as well as the conclusion that the City’s review constitutes a “contested case,” is, as a result, entirely dependent upon the conclusion that the law requires the City’s decision to be made after and based upon the hearing referenced in section 66-43. However, the principle established by the McCoy decision is that gratuitous reference to a

⁵ Curiously, the Court of Appeals embraced a rationale that neither was nor is asserted by the appellant City. At no time has the City ever suggested that the plat application review process constitutes a full-blown “contested case” scenario under the MAPA.

“hearing” is insufficient to convert a generally informal process into a formal “contested case.”

Although Furlong acknowledges that the cited portions of the City’s ordinance do reference a “hearing,” it does not follow that the City’s process for reviewing such plat applications necessarily constitutes a “contested case” requiring and/or authorizing all of the accompanying formalities. Rather, Furlong submits that the “hearing” referred to in the Kansas City Code Chapter 66, which deals solely with the ministerial act of application review and approval,⁶ is more of a formality aimed at providing the general public with notice of impending development within the community.⁷ In fact, Furlong respectfully refers this

⁶ Indeed, both the trial court and the Court of Appeals have correctly noted that review of a plat application is a mere ministerial act to ensure that the applicant has complied with the established criteria established by law. Opinion, pg. 6; *see also Schaefer v. Cleveland*, 847 S.W.2d 867 (Mo. App. 1993)(noting that approval of a subdivision application is a ministerial function where the application otherwise complies with the applicable ordinance).

⁷ Interestingly, a review of the record reveals that one of the primary goals and purposes of the City’s plat-application review process is “[t]o provide for a systematic and speedy administrative review of developments with a stated goal of 90 days for *processing* plats . . .” Ex. 29-E, 66-2(15). This expressly streamlined review within a narrow and discrete timeframe is some indication that the process

Court to section 66-42, which prescribes the “General Procedure” for plat/subdivision applications. Nowhere within that entire section, detailing the required “procedures,” is there reference to a mandatory formal hearing from which the applicant’s rights are to be evaluated and determined. Furlong submits that an applicant can unquestionably navigate its way through the City’s entire plat review process without either the need for or right to a formal hearing. In light of the fact that there is *no legal obligation* on the part of the City to conduct a formal hearing and base its decision upon the information presented at that hearing, it follows that the City’s process constitutes a “non-contested case” as opposed to a “contested case” under MAPA. *See McCoy, supra* at 428-29. As such, Furlong submits that the trial court properly found this matter to be a “non-contested case” subject to *de novo* review.

The “hearing” references set forth in section 66-43(f) and (g) do not suggest a contrary result. In fact, 66-43(g), which governs the City Council’s consideration, specifically vests the City Council with ultimate decision-making authority, which is not contingent upon any issues raised or presented at the

does not contemplate “full blown” adversarial proceedings. Moreover, the ministerial and non-discretionary nature of the process is highlighted by the City’s characterization of the decision as mere “processing.” The Ordinance’s language, when viewed in conjunction with the nature and stated purpose of the process suggest formal adversarial hearings are simply not contemplated or required.

hearing and is not subject to express “gauge or criteria” from that hearing. *See McCoy, supra* at 429. Instead, that provision authorizes and permits the Council to adjudicate the matter independent of any consideration any hearing. Ex. 29-E; section 66-43(g). Nowhere within the provisions cited by this Court is there any reference that the City Council must review, contemplate, or afford deference to the information raised at any such “hearing.” Simply put, the “law” does not require that the City’s decision follow and/or flow from any formal “hearing” at which procedural formalities are followed.

Furthermore, section 66-43(h), which discusses the “public hearing” contemplated, makes clear that this portion of the process is not a *mandated* fact finding “hearing.” Furlong suggests that the clear intent was merely to advise City residents of what developmental activities were being contemplated or addressed and to allow a public forum for political discourse. As noted in subpart (h), the public notice requires a statement of the “general purpose of any such hearing,” implying that such hearings may be conducted for any number of divergent “purposes.”⁸ The sole reasonable conclusion is that the ordinance does not refer to

⁸ While Furlong suspects that one purpose could theoretically be to review and formally assess a pending application, it is not a mandatory purpose “required by law.” The sole appropriate analysis is whether the applicant’s rights are “required by law” to be determined at and as a direct result of such a hearing. *See McCoy v. Caldwell County, supra*.

or require mandatory “contested case” hearings, at which a citizen’s rights are “required by law” to be determined after and as a result of such hearing. Just as in McCoy, the “hearings” referenced in 66-43 simply are not the type of legally-mandated hearings that trigger the “contested case” provisions of MAPA.

This conclusion ultimately makes common and practical sense, given the ministerial nature of the City’s role in reviewing plat applications. As Missouri appellate courts have properly noted, the City’s role in reviewing and considering subdivision applications is extremely limited in nature, generally rising only to the level of a “ministerial act.” Opinion, pg. 6; Schaefer, *supra*; State ex rel. Barth Dev. Co. v. Platte County, 884 S.W.2d 95 (Mo. App. 1994). Furlong submits that the concept of a formal adversarial proceeding such as a “contested case,” which necessitates at least the opportunity to request formal and extensive procedures (including sworn testimony, pre-hearing discovery, compulsory attendance, etc.), is antithetical (at least from a practical standpoint) with the nature and extent of the City’s decision-making role in this case, as it is a mere ministerial function where the plat application complies with the statutory and ordinance requirements.

Moreover, as the record before this Court reflects, the City’s decision-making process is streamlined and informal not only under the plain language of the Ordinance but also from the standpoint of practical application. The record before this Court demonstrates that most such plat applications are routine matters that are effectively “processed” when they meet the listed criteria. Ex. 95-99, 112-118; Tr. 714-715. In approximately the past twelve years, Furlong’s application

was the sole application denied, and most were approved without any type of involved or formal adversarial review process whatsoever. Ex. 95-99, 112-118; Tr. 714-715. Such a procedure, which constitutes a less formal “non-contested case,” is appropriate and necessary, given the City’s ministerial role and its stated goal of “speedy processing” of plat applications.

Additionally, Furlong respectfully submits that the City’s review process constitutes a “non-contested” case, as opposed to a “contested” case under the MAPA because its process fundamentally lacks any indicia of procedural formality or of a truly “adversarial” proceeding. Thus, the trial court properly conducted a *de novo* review of the matter as a “non-contested” case.

This Court has long indicated that “a measure of procedural formality is essential to the meaning of “hearing” as it is used in § 536.010.” City of Richmond Heights v. Bd. of Equalization, 586 S.W.2d 338, 342-43 (Mo. banc. 1979); Hagely v. Bd. Of Ed. of Webster Groves School Dst., 841 S.W.2d 663, 668 (Mo. 1992); Strozewski v. City of Springfield, 875 S.W.2d 905, 906-07 (Mo. 1993). An administrative decision is considered “non-contested” if “the decision is made without any requirement of an adversarial hearing at which a measure of procedural formality is followed. Strozewski v. City of Springfield, *supra*.

The instant matter unquestionably constitutes a review of a “non-contested” case, insofar as none of the contemplated formalities were present in the City’s plat approval process and the City Council’s unexplained denial of Furlong’s plat. There was no adversarial hearing affording due process (Tr., pp. 80-81, 538-539,

120-122, 526); there was no sworn testimony or the opportunity for cross examination (Tr., pp. 80-81, 538-539, 122). There is no formal record either of the City Plan Commission's or the City Council's ultimate decision-making process (Tr., pg. 81); and there is no written decision from either the City Plan Commission or the City Council, including findings of fact or conclusions of law (Tr., pp. 81, 122). Appellant points to no evidence in the record of such components, and the evidence actually supports a contrary conclusion. Instead, there is only the City Council's unwritten unexplained decision to deny approval of Furlong's plat. Tr. pg. 122; Ex.29. Simply put, the denial of a plat in the manner adjudicated by the City in the instant case is a "noncontested case" without a formal record. Since there was (and is) no formal record of the City's underlying decision-making process to review, the trial court was correct in hearing this case *de novo*.

Given all of the foregoing, the appropriate analysis for judicial review entails the following:

[i]n 'noncontested cases,' the circuit court does not review the record for competent and substantial evidence, but instead conducts a *de novo* review in which it hears evidence on the merits, makes a record, determines the facts and decides whether the agency's decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involves an abuse of discretion. The circuit court does not defer to facts found or credibility assessed by the

agency and need not conform doubtful evidence to the agency's decision. Unlike its role in contested cases, the circuit court in a noncontested case acts to determine the evidence and give judgment from that evidence.

Cade, 990 S.W.2d at 37 (citations omitted). In the instant case, the trial court engaged in exactly this type of analysis. LF, pg. 40, Tr., pp. 3-4. Consequently, there was no error, much less prejudicial error.

Even if appellant was correct that a *de novo* review is inappropriate under the circumstances of this case,⁹ appellant's point must nonetheless be denied, insofar as it has wholly failed to identify how the evidence differed or why, in the context of this case, the additional or different evidence affected the outcome of the trial court's decision. It is axiomatic that appellant must demonstrate prejudice from a trial court's ruling in order to be entitled to appellate relief. See Riley v. Union Pacific RR., 904 S.W.2d 437, 443 (Mo. App. 2000); Rule 84.13(b) (2004). In the instant case, appellant suggests that the trial court received "extrinsic testimony and exhibits" when considering the mandamus action. Appellant's Brief, pg. 12. However, nowhere within its brief does it identify or itemize the substantive evidence introduced in the mandamus proceeding that was somehow absent from the City Council's decision-making process. In the absence of such an identification, this Court is thrust into a position of having to independently sift through the record to ascertain what evidence, if any, differs in the two

⁹ Respondent respectfully submits that appellant is incorrect.

adjudications. To do so would require this Court to act as advocate for appellant, a role which it cannot properly occupy. As such, appellant has failed to properly preserve the issue for review, and respondent respectfully submits that this Point must be denied.

Similarly, appellant has wholly failed to identify why the alleged differences in evidence somehow resulted in prejudice to appellant. Noticeably absent from appellant's point is any suggestion whatsoever that the trial court's decision to undertake a *de novo* review of the evidence somehow altered the outcome. Appellant's brief is devoid of any analysis of how the result would have differed or why, had the trial court engaged in a mere "on the record" review of the City's decision on Furlong's plat application. Absent such evidence and information, appellant has preserved nothing for review. Therefore, appellant's Point must be denied.

In summary, the trial court correctly applied a *de novo* review of the City's decision-making process, as the matter unquestionably constitutes a "non-contested case." Moreover, even if the *de novo* review was improper, which respondent respectfully submits it was not, appellant has failed to properly identify how or why that decision made a difference or adversely affected the outcome for appellant. In the absence of such information, appellant has simply failed to present issues for review, and this Court must accordingly deny appellant's first point.

D. THE CITY’S RELIANCE UPON WEATHERBY LAKE IS MISPLACED AND DOES NOT SUPPORT A REVERSAL OF THE WRIT OF MANDAMUS.

The appellant argues that this case should have been reviewed on the “record,” such as it may exist, developed before the full City Council and that it was improper for the Court to conduct a *de novo* review of relevant evidence. In so arguing, appellant has mistakenly attempted to rely on State ex rel. Westside Dev. Co. v. Weatherby Lake, 935 S.W.2d 634 (Mo. App. 1996), to support the position that review of denial of a plat is always based upon a review of “the record” developed before the administrative body. However, the underlying administrative action in Weatherby Lake, unlike the underlying action in this case, was a “contested case,” as that term is used in Missouri administrative law. The Weatherby Lake plat approval process provided for a formal/official transcript of the proceedings, for findings of fact and conclusions of law, and for a written order adjudicating the merits of the case.¹⁰ In short, the administrative hearing process in Weatherby Lake produced a “contested case” under MAPA, for which the applicable standard of review is “on the record.” *See Cade v. State*, 990

¹⁰ Although not clear from the court’s opinion, Furlong suspects, based upon the extensive procedures and formalities required in that case, that the municipal ordinance required the decision to have been generated after and as a result of the hearing process itself.

S.W.2d 32 (Mo. App. 1998). None of the “contested case” formalities present in Weatherby Lake exist in Kansas City’s plat approval process, nor does the City’s ordinance require that an adjudication be made after and as a result of a specific “hearing.” Thus, Weatherby Lake, is inapposite, and appellant’s suggestion that the trial court erroneously utilized a *de novo* review standard is simply misguided.

In essence, the appellant City seeks to have this Court create, from “whole cloth,” an entirely new mechanism for judicial review of a municipality’s administrative land-use decisions, one outside of MAPA. The City implicitly suggests that this Court should simply disregard years of established case precedent as to what constitutes an administrative decision subject to MAPA and, apparently, should create a third option for judicial review of these types of administrative decisions (not a “contested case” or a “non contested case” analysis but rather a new Weatherby Lake analysis and procedure). However, such a suggestion is without any statutory authority or legal precedent whatsoever.

In a nutshell, the City seeks to have its cake and to eat it, too. The City advocates for a judicial review process that essentially mirrors the standard of review for “contested cases” under MAPA (on the “administrative” record), while at the same time carefully rejecting the corresponding proposition that such decisions be accompanied with a requisite level of procedural formalities to guarantee a truly “adversarial” and/or “contested” proceeding. Furlong respectfully submits that this Court should reject such an inconsistent position, particularly absent explicit guidance and/or direction from the legislature. Such a

standard would largely vitiate a citizen's rights to due process and would effectively eliminate any meaningful review by the judiciary. In fact, it would encourage the very type of actions taken by the City in this case, which were expressly found to be unlawful, unconstitutional, and truly irrational. The City's reliance upon Weatherby Lake is, quite simply, misguided and does not support the reversal of the trial court's decision; thus, this Court should summarily reject any contention that the prior Weatherby Lake decision from the Court of Appeals has created some hybrid administrative review process that falls outside of the traditional MAPA analysis.

IV. THIS COURT SHOULD DISMISS THE CITY'S APPEAL OR, AT LEAST, POINT II OF ITS APPEAL BECAUSE IT FAILS TO COMPLY WITH RULE 83.08(b) IN THAT APPELLANT SEEKS TO RAISE AN ADDITIONAL ARGUMENT/ISSUE NOT PREVIOUSLY RAISED IN ITS ORIGINAL BRIEF IN THAT THERE WAS UNQUESTIONABLY SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT THE CITY ACTED IN AN "ARBITRARY AND CAPRICIOUS" MANNER.

(APPELLANT'S SECOND POINT)

A. STANDARD OF REVIEW

In response to appellant's first point, respondent Furlong has previously articulated the appropriate standard of review in this matter. *See* respondent's

discussion, *supra*, Point III.A. In the interest of economy, respondent will not restate those principles herein. Instead, respondent submits that the exact same standard of review applies to appellant's third point, and thus it incorporates its prior discussion by reference as though fully set forth herein.

B. THE CITY HAS VIOLATED RULE 83.08(b) BY RAISING A NEW ISSUE IN ITS BRIEF TO THIS COURT.

This Court should dismiss the City's appeal, as it has violated Rule 83.08(b) by attempting to inject a wholly new and different argument into its appeal. Specifically, appellant's second point argues that the trial court improperly granted mandamus because there was insufficient evidence to find that the City acted in an "arbitrary and capricious" manner, the applicable standard set forth in Mo. Rev. Stat. section 536.150.1. Because this issue was never raised in the City's prior brief, appellant is precluded from raising it now. Given this additional failure to comply with the rules of appellate procedure, Furlong respectfully submits that this Court should either dismiss the City's appeal entirely or, at least, decline to review the City's point as improperly preserved.

Rule 83.08(b) sets forth certain requirements pertaining to substitute briefs after this Court has accepted transfer. That rule expressly provides that a party cannot alter the basis of any claim that was raised in its brief filed with the Court of Appeals. Rule 83.08(b)(2005). Accordingly, a party cannot raise an issue in the substitute brief that was not raised and presented in the Court of Appeals.

Blackstone v. Kohn, 994 S.W.2d 947, 953 (Mo. 1999); Linzenni v. Hoffman, 937

S.W.2d 723 (Mo. 1997); *see also* 17 Mo. Prac. Civil Rules Practice §83.08-3 (3rd. Ed. 2004).

In the instant case, this Court should either dismiss the City’s appeal or disregard Point II, as Appellant has violated Rule 83.08 and attempted to raise an entirely new issue before this Court. Although not clearly articulated, the City appears to argue, for the first time on appeal in *this court*, that the writ of mandamus was improvidently granted, under the trial court’s *de novo* review,¹¹ because there was evidence presented at trial that purportedly provides a “rational” explanation for the City Council’s denial and thus, the decision was not “arbitrary and capricious.” Appellant’s substitute brief, Point II. However, this point was never raised or argued before the Court of Appeals, and accordingly, the City’s point violates the express terms of Rule 83.08, which precludes a party from raising new or additional arguments in a party’s substitute brief. None of the City’s original points raised the issue of whether there was sufficient evidence, at the mandamus proceeding, to find that the City acted in an “unlawful, unreasonable, arbitrary, or capricious” manner. *See* Mo.Rev.Stat. §536.150.1 (2005). The sole point raised by the City at the Court of Appeals, as to the mandamus portion of the trial court’s judgment, was that the trial court utilized the incorrect standard of review. Given the City’s disregard for the rules of appellate procedure, Furlong respectfully submits that this Court should either dismiss the City’s appeal in its entirety or disregard Point II altogether.

¹¹ Which was undertaken pursuant to Mo. Rev. Stat. § 536.150.1 (2000).

**C. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE
TRIAL COURT’S FINDINGS.**

Even if the City had properly preserved this point, it nonetheless must be denied, as it fundamentally misunderstands the scope of appellate review. As the City properly notes in its initial discussion of the “standard of review,” the trial court’s judgment must be upheld unless there is no substantial evidence to support it. However, instead of addressing the issue within the proper scope of review, the City proceeds to then reformulate the issue by arguing that, in hindsight, there was some “rational” reason for denying the plat. In short, the City’s *post hoc* rationalizations, none of which were ever communicated to Furlong, do not alter either the analysis or the ultimate conclusions in this case, as the City’s argument misunderstands the scope of review on this issue.

The trial court correctly found that the City acted “unlawfully, unreasonably, arbitrarily, and capriciously,” based upon substantial evidence, and thus, properly entered its writ of mandamus. Furlong elicited substantial evidence that the preliminary plat complied with all of the subdivision regulations (Tr. 24-25, 51-52, 228), thus, rendering the City’s subsequent role in the decision nothing more than a ministerial act of approval/processing.¹² Although standard

¹² It is important to note that the City has never, at least until this newly and improperly raised point, challenged the trial court’s finding or the accompanying conclusion that its role constituted a “ministerial act.” As such, Furlong

conditions were attached to the preliminary approval by the City staff, all such applications came with such conditional approval. Furlong acceded to these conditions. Ex. 29, ¶ 19. Nonetheless, the plat application was summarily rejected, without notice or explanation. Ex. 29, ¶; Tr., pp. 120-122, 526. Furlong attempted to learn the basis for the City’s denial throughout the process; however, he was stymied in these attempts and was ultimately told that City staff could not discuss it further “for fear of litigation.” Tr., pp. 544, 549, 567, 112-113, 115. Moreover, there was extensive evidence that the City was motivated by concerns outside of those properly considered during the plat-application process. *See* Statement of Facts, subpart c.-pp. 18-23. In fact, one of the Council members stated that there was no legal basis to reject the Furlong application and that the city’s counsel had advised the various members of the same. Tr. 776. Simply put, there was and is substantial evidence from which the trial court could find that the City acted “unlawfully, unreasonably, arbitrarily, and capriciously.” Thus, the City’s point, even if it had been properly raised and preserved, must be denied.

V. THE TRIAL COURT CORRECTLY ENTERED JUDGMENT ON FURLONG’S CLAIM FOR DEPRIVATION OF SUBSTANTIVE DUE PROCESS RIGHTS BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT’S FINDING THAT

respectfully submits that the conclusion that the City was performing a “ministerial function” is not properly before this Court for review.

THE CITY ACTED IN A “TRULY IRRATIONAL” MANNER IN THAT THE EVIDENCE DEMONSTRATED THAT THE CITY’S FUNCTION IN REVIEWING FURLONG’S PLAT WAS PURELY MINISTERIAL AND THAT ITS CONDUCT IN THIS CASE WAS TRULY IRRATIONAL, UNLAWFUL, GROSSLY ATYPICAL, AND PRETEXTUAL.

(APPELLANT’S THIRD POINT)

A. STANDARD OF REVIEW

In response to appellant’s first point, respondent Furlong has previously articulated the appropriate standard of review in this matter. *See* respondent’s discussion, *supra*, Point III.A. In the interest of economy, respondent will not restate those principles herein. Instead, respondent submits that the exact same standard of review applies to appellant’s third point, and thus it incorporates its prior discussion by reference as though fully set forth herein.

B. FURLONG STATED A VALID CLAIM FOR DAMAGES UNDER 42 U.S.C § 1983 FOR VIOLATIONS OF HIS CONSTITUTIONAL RIGHTS TO SUBSTANTIVE DUE PROCESS.

Appellant argues in its sub-point that “there is no cause of action that allows an applicant to recover money damages based on the initial denial of a preliminary plat application and its later approval.” Appellant’s Brief, pg. 15. However, such

a cause of action is clearly recognized under Missouri law, and thus, appellant's point must be denied.

Interestingly, while appellant contends that no valid cause of action exists *in this situation*, it concedes that such a cause of action exists. In his second sub-point, appellant actually describes the elements of a cause of action for a "substantive due process claim." Appellant's Brief, pg. 15-18. Appellant further cites numerous cases from within both the Eighth Circuit as well as the state of Missouri that have either expressly or implicitly recognized the viability of such a claim. Appellant's Brief, pp.16-18. Nonetheless, appellant asserts that no valid claim exists as it relates to this specific type of administrative decision (a plat application review process), ostensibly because there are no reported appellate decisions that have affirmed a judgment in favor of the property/interest holder from either this Court or the Eighth Circuit Court of Appeals. Simply put, Appellant's argument misses the mark.

The fact that there are no reported decisions affirming an award of damages relating to the denial of a plat application is largely irrelevant and hardly dispositive of the issue presented by this case. If Furlong can demonstrate the elements of a claim under 42 U.S.C. § 1983, then it has stated and established a valid cause of action against the City and is entitled to appropriate damages. As discussed below, Furlong unquestionably presented sufficient evidence to establish the elements of a claim. The fact that there is no Missouri or Eighth Circuit precedent squarely on "all fours" with Furlong's situation is beside the

point. Respondent submits that there are very few situations where case precedent will squarely address every situation, and such is the nature of our system of jurisprudence. Instead, the relevant focus is whether a cause of action generally exists, and if so, whether the claimant has either stated or established his claim. In this case, Furlong clearly has pleaded and proved his claim, as recognized and adjudicated by the trial court. Accordingly, this Court must deny appellant's sub-point, as Furlong did plead and prove a viable cause of action for constitutional violations by the City.

C. FURLONG SUBMITTED SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE CITY ACTED IN A “TRULY IRRATIONAL” MANNER AND, HENCE, THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT HIS CLAIM FOR DAMAGES UNDER 42 U.S.C. § 1983 DUE TO THE CITY’S VIOLATION OF FURLONG’S SUBSTANTIVE DUE PROCESS RIGHTS.

The Due Process clause within the United States Constitution provides that “[n]o State shall . . . deprive any person of life, liberty or property without due process of law.” U.S. Const., Amendment XIV, Section 1. As interpreted by the United States Supreme Court, the due process clause safeguards rights in two ways. First, procedural due process requires state and local governments to employ fair procedures when they deprive persons of a constitutionally-protected interest in “life, liberty or property.” Thus procedural due process protections

guard against “substantively unfair and simply mistaken deprivations of property.” Fuentes v. Shevin, 407 U.S. 67, 80-81, 92 S.Ct. 1983, 1984 (1972).

The Due Process clause, however, guarantees more than fair process. It also has a substantive component that bars certain governmental actions regardless of the procedures used to implement them, and is intended to secure the individual from the arbitrary exercise of the powers of government. Washington v. Glucksberg, 521 U.S. 702, 719, 117 S.Ct. 2258, 2267 (1997); Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986). It is this substantive aspect of due process that is at issue in the instant case.

In a land-use case, such as the instant matter, to prevail on a substantive due process claim under 42 U.S.C. § 1983, a plaintiff must establish two items. As a threshold matter, a plaintiff must establish that it has a “protected property interest to which the Fourteenth Amendment’s due process protection applies.”¹³

Bituminous Materials. Inc. v. Rice County, Minnesota 126 F.3d 1068, 1070 (8th Cir. 1997); Woodwind Estates Ltd. v. Gretkowski, 205 F.3d 118, 123 (3rd Cir. 2000). In addition, a plaintiff must further demonstrate that the state actor’s conduct was “something more than arbitrary, capricious, or in violation of state

¹³ A protected property interest arises if a state law or regulation limits the issuing authority’s discretion to restrict or revoke a permit or license by requiring that the permit issue, as a matter of right, upon compliance with terms and conditions prescribed by statute or ordinance. Bituminous Materials, 126 F.3d at 1070.

law.” Bituminous Materials, Inc., 126 F.3d at 1070. Courts in Missouri, as well as the Eighth Circuit, have indicated that this second requirement must involve “truly irrational” governmental actions. Chesterfield Development Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (8th Cir. 1992); Lemke v. Cass Cty, 846 F.2d 469, 471-73 (8th Cir. 1997); Frison v. City of Pagedale, 897 S.W.2d 129 (Mo. App. 1995).¹⁴

In the instant matter, the City has not and does not contest or dispute the trial court’s finding that Furlong had a constitutionally-protected property interest, insofar as the City’s decision with respect to the Furlong plat application was a ministerial act, one in which it had no discretion, upon compliance with the terms and conditions of the subdivision ordinance. Neither appellant’s Points Relied On nor its argument address this issue or assert that the trial court’s findings on this issue were erroneous. As such, the sole issue for this Court to review is the second prong: whether there was evidence to support the trial court’s finding that the City acted in a “truly irrational” manner with respect to the Furlong plat application.

Although the applicable standard within both the Eighth Circuit and Missouri has been established and articulated by the courts, there are few reported decisions within this jurisdiction that have attempted to define what qualifies as

¹⁴ In this case, the trial court conducted this exact analysis, and after evaluating all of the evidence, it concluded that the City’s conduct was “truly irrational,” something more than a mere violation of state law. LF, pp. 40-47.

“truly irrational” conduct under 42 U.S.C. § 1983, in the context of a land-use issue. While appellant points primarily to two decisions: Chesterfield and Frison, neither of those decisions provides meaningful guidance as it pertains to a subdivision application, where the state actor has only a ministerial function.¹⁵ Instead, those decisions involved situations where the state actor had substantial discretion in reaching its decision. In fact, the decisions in Chesterfield and Frison involved discretionary governmental decisions in which constitutionally protected rights were either non-existent or highly questionable. Therefore, those cases provide no real guidance and are not dispositive of whether the city’s actions in this case were “truly irrational.” Other courts, dealing with circumstances where little or no governmental discretion was involved and constitutionally protected rights were clearly implicated, have not been reluctant to find a substantive due process violation.

For example, in Woodwind Estates Ltd. v. Gretkowski, 205 F.3d 118, 123 (3rd Cir. 2000), a developer brought a civil rights action under 42 U.S.C. § 1983 against the defendant township for failure to approve plans to subdivide property for the purpose of building low income housing. The district court granted defendant’s motion for summary judgment on plaintiff’s substantive due process

¹⁵ As previously discussed, the trial court properly made that exact finding, and appellant has raised no suggestion of error with respect to that point. As such, that finding is not presented for this Court’s review.

claim, but the Third Circuit reversed. Although the developer's preliminary development plan satisfied all applicable ordinances, the township first took no action for several months, and then denied approval of the plan, without providing the developer with any explanation or reason.

The Third Circuit in Woodwind Estates emphasized that developers have a due process right to be free from "arbitrary and irrational zoning actions." Woodwind Estates, 205 F.3d at 122, (quoting Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 263, 97 S.Ct. 555 (1977)). The Third Circuit concluded that evidence suggesting that the township acted improperly and for "reasons unrelated to the merits of the application for the permit" could support a finding that the government arbitrarily and/or irrationally abused its power, thus violating the developer's substantive due process rights. Id. at 124. Significantly, the Third Circuit cited evidence that the township, in a way similar to the City in this case, had demanded information not required by the ordinance and had delayed issuance of the permit, knowing that the developer would be unable to meet financing deadlines. The Court concluded, consequently, that such evidence provided a basis to find that the township's decision was made in bad faith or was based upon improper motives. Id.

In so holding, the Court in Woodwind Estates relied on Bello v. Walker, 840 F.2d 1124 (3rd Cir. 1988), which involved a suit brought by a developer under 42 U.S.C. § 1983, alleging a substantive due process violation against a

municipality for refusing to issue a building permit under a previously approved subdivision site plan. In Bello, there was evidence that members of the city council had refused to issue the building permits because of their opposition to the proposed multi-unit housing project and animosity towards the plaintiff developer. The Third Circuit Court of Appeals reversed the district court's summary judgment in favor of the municipality, stating that the due process clause is "intended to secure the individual from the arbitrary exercise of the powers of government." Bello, 840 F.2d at 1128. Further, the Third Circuit stated that such governmental actions based on political or other reasons, and unrelated to the merits of the Plaintiff's application, "can have no relationship to any legitimate governmental objectives, and if proven, are sufficient to establish a substantive due process violation actionable under Section 1983." Id. Accord, Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983). (Where plaintiff presented evidence that town council's refusal to issue plaintiff a building permit to which he was entitled under South Carolina law, was motivated by a lack of impartiality, plaintiff stated a claim for violation of his substantive due process rights); DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592, 601-602 (3rd Cir. 1995) (Substantive due process violation will lie when governmental authorities decision was motivated by economic conflict of interest or political animus.)

In a case remarkably similar to this one, the Ninth Circuit Court of Appeals in Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988), affirmed the district court's determination that the city's refusal to issue a building permit to the

plaintiff property owner, even though he satisfied all legal requirements, violated the property owner's substantive due process rights. There, as here, the city was required to issue a building permit upon plaintiff's compliance with applicable laws and regulations. The Ninth Circuit stated that the city council's decision to withhold the building permit deprived the landowner of "any process, let alone 'due' process" and that this type of "arbitrary administration of the local regulations, which singles out one individual to be treated discriminatorily, amounts to a violation of that individual's substantive due process rights." Id. at 1303. The Court found that the arbitrariness of the city council's decision was underscored by the fact that the city attorney warned the city council that, if they denied the building permit, a court would probably overturn that action, and hold them liable for the resulting damages. Id.

Relying on Bateson, the Supreme Court of Washington in Mission Springs, Inc. v. City of Spokane, 134 Wash.2d 947, 954 P.2d 250 (Wash. 1998), reversed the lower courts award of summary judgment in favor of the defendant city in a suit in which a developer brought a Section 1983 action claiming that the city had arbitrarily and capriciously refused to grant him a grading permit. The Washington Supreme Court held that the trial court erred in dismissing the developer's substantive due process claim, stating: "Arbitrary or irrational refusal or interference with processing a land use permit violates substantive due process." Id. at 970. Citing the Black's Law Dictionary definition of "irrational" as "unreasonable, foolish, illogical, absurd. . .," the Court held that the city

council's actions were irrational because they "...rejected lawful, mandatory requirements for the processing and issuance of grading permits codified in state statutes and local ordinances without reasonably tenable lawful justification." Id. at 970. Further, the Court found that although the "irrationality" was objectively established by the departure from mandatory legal process, it was also "dramatized" by the city council's rejection of the advice of its own attorney who advised that their actions would likely be found illegal.

The decision in Mission Springs was recently cited with approval by the California Supreme Court in Galland v. City of Clovis, 24 Cal. App. 4th Supp. 1003, 16 P.3d 130, 103 Cal. Rptr. 2d 711 (2001). Galland involved an action brought against a city alleging a substantive due process violation based on the city's refusal to allow plaintiff's request for rent increases for their rent-controlled property. In reversing the lower courts dismissal of the substantive due process claim, the California Supreme Court concluded that "... a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983." Galland, 24 Cal. 4th at 1034, quoting Silverman v. Barry, 845 F.2d 1072, 1080 (D.C. Cir. 1988). Significantly, the court in Galland concluded:

"In cases such as the present, a deliberate flouting of the law may be said to have occurred if the city's demands for information and other procedural demands were so excessive and irrelevant to the regulatory task at hand as to lead a court to conclude that such demands were imposed not to obtain more information or increase

the reliability of the eventual decision, but rather to obstruct or discourage landlords from either requesting or obtaining reasonable rent increases to which they are constitutionally entitled. Galland, 24 Cal. 4th at 1036, 16 P.3d at 153.

The clear lesson that emerges from these cases is that, when government actors refuse to do what their own rules clearly require, and, furthermore, try to mask their real motives for disapproval through silence, a substantive due process violation will lie.

In the instant case, there was voluminous evidence developed at trial demonstrating that the City’ decision-making process was “truly irrational,” thus violating Furlong’s right to substantive due process. Upon review of Furlong’s plat application, City staff concluded that the application met the Subdivision Regulations and so advised the Plats Review Committee Tr., pp. 24, 333; Ex. 29, ¶ 15; Ex. 29-I. On behalf of City staff, Ms. Virginia Walsh, the staff planner for the Furlong plat application,¹⁶ then counseled the City Plan Commission, advising that the Plat Application complied with the Subdivision Regulations and recommending that the Plat Application be allowed, subject to compliance with certain routine conditions. Tr., pp. 24, 333. Although Furlong willingly acceded

¹⁶ Ms. Walsh is a long-time employee within the City Planning and Development Department, where she works as the manager of the development management division. Tr., pp. 6-7.

to these conditions, the City Plan Commission, evidently buckling to pressure from John Loss (who presented himself as both an attorney and neighborhood activist), recommended disapproval, without ever providing Furlong with any reasons for the denial or affording him an opportunity to correct any alleged deficiencies. Tr., pp. 81, 538-539. Moreover, when Furlong subsequently inquired as to whether he needed to submit a revised plat, which reflected his accession to the standard conditions, he was told such a revision was not necessary. Tr., pp. 110, 131, 161. In fact, City staff refused to accept the revised plat when offered by Furlong. Tr., pp. 110, 131, 161-162.

Following the Plan Commission's decision in December of 1999, Furlong's repeated attempts to learn why the Plat Application was denied were met with nothing but stonewalling. In fact, when Furlong directly confronted Ms. Walsh and asked her in what way the plat application failed to meet the Subdivision Regulations, she was instructed by Loss, who was not the City's attorney-but acted as if he were, not to answer. Tr., pp. 112-113. Walsh complied with his instruction. Tr., 112-113. Ms. Walsh then had a subsequent conversation with Mike Furlong in which she stated that she no longer could comment on whether his plat complied with the subdivision regulations "for fear of litigation." Tr., pg. 115.

Thereafter, Furlong suffered through four hearings before the City Planning, Zoning and Economic Development Committee. Ex. 29, ¶¶ 24, 26, 30-33. Although the City, including its agent Ms. Walsh and her department, had

never previously asked for a traffic study, Furlong was asked at the second P&Z Committee hearing to perform such a traffic study, an extraordinary requirement for which no authority exists in the Subdivision Regulations.¹⁷ Ex. 29, ¶ 26. Once again, Furlong complied, expending significant time and resources, despite the fact that such a request is not identified as either a requirement under the subdivision regulations or a pertinent standard. Tr., pp. 568-569; Ex. 108; Ex. 29, ¶ 30. Furlong's traffic consultant, an individual with some thirty years of experience in evaluating traffic issues, concluded that there would be no significant impact on traffic in the area as a result of the proposed uses¹⁸ of the property. After review, the City's own transportation services manager, Mr.

¹⁷ Interestingly, Loss asked at the City Plan Commission hearing on December 7, 1999, for a traffic study to be done and paid for by Furlong. When the traffic study was later done and the City's own traffic engineer agreed there would be no adverse impact, Loss argued the study could not be trusted because it was paid for by Furlong.

¹⁸ It is again worthy of mention that a plat application seeks only to subdivide property into parcels. It does not specifically identify or define use. Issues pertaining to use are more properly characterized as zoning issues, which are not presented in this case. In fact, the undisputed evidence was that the proposed uses were all consistent with and permitted by the zoning classification for the property. Tr., pp. 35-37.

Moshin Zaidi, subsequently concurred in this conclusion. Ex. 29, ¶ 35; Tr., pg. 58.

What was the P&Z Committee's response, having received the additional, albeit superfluous, information that it requested? It went into yet another closed session and then ultimately tabled the plat application indefinitely, apparently in the hope that Furlong would simply drop the matter. Ex. 29, ¶¶ 36-37, Tr., pg. 762.

At each of the four P&Z Committee hearings there was an expectation by Furlong that a decision would be made to approve his subdivision plat and remedy the City's prior wrongful denial. Tr., pp. 118-122. Furlong presented evidence that of the 197 plat applications filed with the City in the last decade, all but Furlong's plat application were approved with little or no delay. Ex. 95-99. All of those prior plat applications contained similar conditions to those established by city staff and approved by Furlong as part of his application. Ex. 95-99.

Conversely, Furlong's application was continually thwarted. The City continually avoided its non-discretionary obligations, without ever articulating the reasons why the application was being denied. Tr., pg.122. In fact, during the entirety of the application process, Furlong was never given a reason as to why the plat application was not being approved. Tr., pg. 122. The City then compounded its impropriety by adding additional and improper burdens upon the applicant (i.e., the traffic study) and then ultimately deciding to indefinitely hold the application "off the docket". Tr., pg. 162, Ex. 29, ¶ 37. Instead of a decision on the merits, the City voted to place Furlong's application in administrative limbo. Tr., pg. 762.

Although the P&Z Committee ultimately voted to indefinitely table Furlong's application, a solitary member of the city council, Councilman Ed Ford, ultimately acted to remove the indefinite hold and to place the matter before the full City Council to obtain a decision on the merits. Ex. 29, ¶ 39. Interestingly, Councilman Ford, an attorney and long time city councilperson, indicated publicly during that period of time that the City had no legal basis to reject Furlong's plat application and that it was obligated to approve his application. Tr., pp. 772-773. That information had been formed based upon advice from the City's legal department, which was apparently given during a closed session of the P&Z Committee. Tr., pg. 776. Despite this legal admonition from the City's own attorney, the full city council nonetheless voted, without either notice or comment, to deny Furlong's application on May 4, 2000. Ex. 29, ¶ 40; Ex. 29-Y.

In refusing to approve Furlong's plat application, the City was clearly influenced by matters unrelated to the merits of the plat application, and it continuously sought to impose considerations beyond those permitted under the Subdivision Regulations. In doing so, the City acted irrationally, as a matter of law. Moreover, just as in Bateson and Mission Springs, the unlawfulness and irrationality of the City's action is underscored and "dramatized" by the City Council's conscious disregard of the advice of its members and its own legal staff. Gambling that it would be immune from liability, the City forced Furlong to resort to the judicial process to vindicate rights to which it was clearly entitled, having complied with the articulated standards and requirements set forth in the City's

own Subdivision Regulations. As the United States Supreme Court stated in Owen v. City of Independence, Missouri, 445 U.S. 622, 100 S.Ct. 1398 (1980), in holding that municipalities are not immune from liability under 42 U.S.C. § 1983:

“But a municipality has no “discretion” to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality’s conduct in a § 1983 action, it does not seek to second-guess the “reasonableness” of the city’s decision nor to interfere with the local governments resolution of competing policy considerations. Rather it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.” Owen, 445 U.S. at 649, 100 S.Ct. at 1414-15.

Because Section 1983 was intended not only to compensate victims of past abuses, but to serve as a deterrent against future constitutional deprivations, the Supreme Court in Owen, stated that government officials “who may harbor doubts about the lawfulness of their intended actions” must “err on the side of protecting its citizens’ constitutional rights.” Id., 445 U.S. at 652, 100 S.Ct. 1416.

The City made no attempt in this case to err on the side of protecting its citizens’ constitutional rights; in fact the City did just the opposite. It would be difficult to imagine a set of circumstances in which a governmental entity acted more arbitrarily and with such complete disregard for the requirements of its own rules and ordinances. The evidence presented in this case fully supports the

conclusion that the City acted arbitrarily, unreasonably and truly irrationally, all in contravention of Respondent's substantive due process rights. As noted by the trial court:

“Viewed against the backdrop of the City’s consistent pattern and practice of approving preliminary plats, the conduct of the City as it relates to Relator was clearly atypical. Relator was subjected to unreasonable delays and required to fulfill conditions in advance of approval without further explanation. From the evidence presented at both hearings, the City’s decision appears to have been motivated by sources that are not to be considered when approving a preliminary plat. Because the City’s conduct so clearly was atypical and because the City had only a ministerial role in approving preliminary plats, thereby lacking the discretion to deny approval of Relator’s preliminary plat, the court finds the city’s conduct to be more than a mere violation of the law but that the action of the City rose to the level of truly irrational. Therefore, the court finds that the City violated Relator’s right to substantive due process.” (LF, pg. 46) (emphasis added)

In summary, there was overwhelming evidence in this case that the City's decision was "truly irrational," in contravention to Furlong's right to substantive due process¹⁹.

Appellant appears to contend that Furlong cannot maintain his substantive due process claim because there was some "rational basis" for denying Furlong's plat application, even though such rationale was neither a specific standard/requirement under the subdivision regulations nor a justification clearly articulated to Furlong at any time. In raising this issue, the City points (after the fact) to non-specific "traffic" concerns and the "purposes" provision within the subdivision regulations, which sets forth the general purposes that the regulations are intended to serve through the articulated standards ultimately set forth in later portions of the regulations. *See* Appellant's Brief, pg. 19. Appellant's reliance upon *post hoc* rationalizations and the "general purpose" provisions is simply without merit.

¹⁹ Amicus Curiae cites to a Minnesota federal district court opinion as mandatory a contrary conclusion. However, Furlong respectfully submits that that decision, Heritage Development v. Corbin, is factually distinguishable and that the drastically different factual record actually highlights why the City's conduct in this case was "truly irrational." As such, that case does not mandate a contrary result.

As an initial matter, Furlong is compelled to point out that this Court must disregard all evidence that runs contrary to the trial court's actual findings in this case; all inferences must be construed in favor of Furlong. Wildflower Community Ass'n Inc. v. Rinderknecht, 25 S.W.3d 530, 534 (Mo. App. 2000). Thus, even if it were permissible to consider the "general purpose" provisions, which Furlong respectfully submits it was not, this issue is simply a red herring, insofar as the record, as discussed above, clearly supports the trial court's finding that the City's decision making process was "truly irrational;" all other evidence to the contrary must be disregarded.

In any event, as Missouri courts have consistently made clear, a municipality may not deny approval of a preliminary plat based upon generalized "purposes" clauses within subdivision regulations, such as those proffered and relied upon by the appellant in this case (§ 66-2(a) and 66-2(b)(7)). *See* Schaefer v. Cleveland, 847 S.W.2d 867, 872-73 (Mo. App. 1993). In fact, the Schaefer court specifically held that it was "improper to utilize the very general language of the 'purposes' section of the . . . ordinance mentioning 'public health, safety, convenience, and general welfare' as a grant of otherwise unmentioned subjective discretion." Schaefer, *supra*, at 872. The Court went on to note that Missouri law "does not permit administrative bodies to exercise an arbitrary and subjective authority over the granting or denying of subdivision plats." *Id.* at 873. It also held that such general purposes provisions cannot be used to "hold in reserve

unpublished requirements capable of general application for occasional use.” Id.

The Court of Appeals concluded that such acts were unconstitutional, in that:

“The general rule is that any ordinance which attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance, is an unwarranted attempt to delegate legislative functions to such officer, and for that reason is unconstitutional.”

Id. Consequently, the Schaefer court held that the City in that case acted in an irrational and unconstitutional manner, requiring the issuance of an order compelling the City to approve the plat, in accordance with its ministerial function. Id.

In the instant case, appellant cannot properly rely upon the “purposes” provisions of the City’s subdivision regulations to create an after-the-fact rationalization for denying Furlong’s plat application. Simply stated, those general purpose provisions contain no concrete standard for applicants to meet, and accordingly, there is no objective means for measuring compliance with such generalized goals. As the Schaefer court made clear, Missouri affords no discretion to approve or disapprove a plat, absent clearly-articulated standards. *See Schaefer*, 847 S.W.2d at 872 (citing Basinger v. Boone County, 783 S.W.2d 496 (Mo. App. 1990)). Had the City desired to specify that traffic concerns raised by the proposed subdivision are to be adequately explored and addressed by an applicant, then it was required to promulgate clearly-articulated standards

addressing the same within its subdivision regulations. Its failure to do so precludes the City from now arguing, after the fact, that such a general purpose provision now provides some “rational” justification for the denial.

Even if one were to assume that traffic concerns were a legitimate consideration based upon the “purposes” clause, one which might provide some rational basis throughout the decision-making process, there can be no question but that traffic concerns do not constitute a rational basis in the instant matter. Although the City of Kansas City’s subdivision regulations do not set forth specific and articulated criteria relating to traffic, the City nonetheless required Furlong to go to great length and expense to hire a traffic engineer to conduct a comprehensive traffic study pertaining to the plat application and any proposed uses. Tr., pp. 568-569; Ex. 29 ¶¶ 30, 33. Although Furlong did not believe that the City had the authority to make such a request, it nonetheless hired a highly regarded traffic engineer, Mr. Paul Bertrand, from the engineering firm of George Butler & Associates, Inc., to conduct a comprehensive traffic study (the “traffic study”) relating to the property at issue. Ex. 29, ¶¶ 30, 33; Ex. 29-T; Ex. 29-V. Mr. Bertrand’s traffic study was completed during the course of the application process and presented to the City through the City’s P&Z Committee hearings. Ex. 29, ¶¶ 31-32; Tr., pp. 566-567. The study was subsequently evaluated by the appellant’s own lead traffic engineer, who concurred in the results and agreed that the subdivision application and its proposed uses would have no adverse impact whatsoever on traffic within the area. Tr., pg. 58, Ex. 29, ¶ 35. Given that the

evidence developed at trial demonstrates a fundamental disconnect between the City's *post hoc* rationalizations and the City's ultimate denial of Furlong's application, the City's argument must necessarily fail. Simply stated, traffic issues provided no basis to call into question the trial court's ultimate finding that the City acted in a "truly irrational" manner. All competent evidence adduced before the trial court reflects that traffic was not a legitimate concern, even if it could have been properly considered through the "general purpose" provision.

In fact, the trial court expressly considered the City's *post hoc* rationalizations pertaining to potential traffic issues and expressly rejected the same. The Court noted:

"Respondent's [sic] [the City of Kansas City] also claimed that Relator's [Furlong] preliminary plat did not comply with the general provisions contained in the subdivision regulations, under §§ 66-2(a)(b) 1-13. The Court is mindful that Respondent at no time provided Relator with any clear or articulated reasons for denial of the preliminary plat. To suggest violations of various provisions of subdivision regulations without being more specific is specious. Therefore, these additional claims for denial are improper." LF, pg. 41.

Despite appellant's suggestion, there can be no question but that Furlong presented substantial evidence to support the trial court's finding that the City acted in a

“truly irrational” manner, given that it maintained only a ministerial function in approving Furlong’s plat application. As such, appellant’s point must be denied.

**D. THE TRIAL COURT’S ORDER COMPELLING THE CITY
TO COMPLY WITH THE LAW AND REMEDY ITS
WRONGFUL CONDUCT DOES NOT ELIMINATE
FURLONG’S RIGHT TO PURSUE DAMAGES.**

Although not altogether clear, appellant appears to argue in third sub-point that Furlong cannot maintain a “substantive due process” claim because the trial court ultimately remedied the City’s “unlawful, unreasonable, arbitrary and capricious” conduct by way of Mandamus. Respondent respectfully submits that appellant fundamentally confuses the concepts of substantive due process and procedural due process, and thus, misses the mark entirely.

Pursuant to 42 U.S.C. § 1983, Furlong is entitled to damages if he can prove that such damages flowed from the state actor’s conduct in violating his constitutional rights. *See Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). The fact that the illegal and arbitrary acts of the City were ultimately corrected by judicial intervention does not somehow eliminate the prior constitutional violations. Under appellant’s analysis, there could never be a successful claim for damages, if judicial review was available to reverse the bad actor’s conduct. State actors, such as the City in the instant case, would be free to unlawfully treat its citizenry with impunity, knowing that an alternative branch of government would correct their actions in violating the constitutional rights of third parties. Such an

argument borders on the absurd and certainly flies in the face of both the letter and the spirit of 42 U.S.C. § 1983. Simply stated, appellant's subpoint C should be denied.

VI. THE TRIAL COURT CORRECTLY ENTERED JUDGMENT IN FURLONG'S FAVOR BECAUSE FURLONG SUBMITTED SUBSTANTIAL EVIDENCE OF PROXIMATELY-CAUSED DAMAGES UNDER 42 U.S.C. § 1983 ARISING FROM THE CITY'S VIOLATION OF FURLONG'S SUBSTANTIVE DUE PROCESS RIGHTS.

(APPELLANT'S FOURTH POINT)

A. STANDARD OF REVIEW

In response to appellant's first point, respondent Furlong has previously articulated the appropriate standard of review in this matter. *See* respondent's discussion, *supra*, Point III.A. In the interest of economy, respondent will not restate those principles herein. Instead, respondent submits that the exact same standard of review applies to appellant's fourth point, and thus it incorporates its prior discussion by reference as though fully set forth herein.

B. FURLONG SUBMITTED SUBSTANTIAL EVIDENCE OF HIS DAMAGES, WHICH WERE CAUSED BY THE CITY'S UNLAWFUL CONDUCT.

Appellant's fourth point must be denied, as there was substantial evidence to support Furlong's claim for damages in this case. Contrary to appellant's

suggestion, Furlong's theory of damages did not primarily involve an inability to obtain building permits. Instead, Furlong presented substantial evidence that the refusal to approve the plat application directly resulted in construction delays (Tr., pp. 510, 551, 639), which in turn, caused losses of capital and interest income (Tr., pp. 557, 561, 586, 833, 836-837), revenue streams from the proposed lease of part of the subdivision (Tr., pp. 559, 832), additional real property tax expenditures (Tr., pp. 573, 840, 844), lost profits from delays (Tr., pp. 552, 819) and additional fees and construction expenses to address the unlawful conduct. (Tr., pp. 511, 555, 580) Furlong presented evidence that but for the delays caused by the City, Furlong would have been able to move forward with his business operations and to execute the various contracts to develop the remaining parcels. (Tr., pg. 639) His inability to continue moving this process forward, as he was rightfully entitled to do, resulted in economic losses in the amount of \$224,871.00. (Tr., pg. 850) In addition, Furlong demonstrated that he incurred \$148,435.20 in attorney fees necessarily incurred in reversing the City's unlawful conduct. (LF, pg. 63) In short, there is substantial evidence to support the trial court's finding that the City's unlawful conduct was a substantial contributing factor in Furlong's economic losses.²⁰ As such, appellant's point must be denied.

²⁰ Furthermore, the City's suggestion that Furlong is responsible for his own losses due to "inaction" is simply disingenuous and misleading to this Court. Furlong filed his action the day after the City Council's final decision in this matter. The

city then requested additional time to file its answer, and the matter was transferred between divisions within Jackson County. The parties then jointly filed an application to briefly continue the trial date to accommodate the parties and counsel. LF, pp. 1-2. The mandamus count was heard and decided within six months of filing, certainly not an undue delay, and appellant's contrary suggestion is simply specious. Moreover, to suggest that Furlong should have acquiesced to hearing the matter under an incorrect standard of review, merely to permit the possibility of an expedited hearing is equally without merit. Parties are not required to waive their rights on such critical issues.

CONCLUSION AND REQUEST FOR ATTORNEY'S FEES

Wherefore, for the foregoing reasons, respondent Furlong respectfully requests that this Court strike appellant's brief and dismiss the appeal for failure to comply with the appellate rules. In the event the Court deems it appropriate to consider the merits of appellant's brief on the issues properly preserved, respondent Furlong respectfully submits that appellant's points must be denied and the trial court's judgment in favor of Furlong must be affirmed. Respondent Furlong further respectfully requests that the Court grant Furlong its costs and expenses incurred herein and for such other and further relief as the Court deems just and proper.

Finally, pursuant to 42 U.S.C. 1983, Furlong respectfully requests that the Court award Furlong its reasonable attorney's fees in litigating this matter for this Court. In the event that this Court affirms the trial court's judgment, an award of fees is both reasonable and necessary. Furlong is prepared to submit an appropriate affidavit and supporting documentation to detail the attorney fees and expenses incurred during the pendency of this appeal. Furlong would respectfully request that this Court consider and rule upon the attorney fee issue or that the matter be remanded for an appropriate determination by the trial court as to reasonable and necessary attorney fees, whichever method this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE

I hereby certify that to the best of my knowledge, information and belief and after reasonable inquiry, this brief complies with the limitations of Rule 84.06(b). There are 17,576 words in this brief, and 1,835 lines of monospaced type.

A floppy disk is enclosed for filing with this brief. The floppy disk enclosed has been scanned for viruses and is virus-free.

Two copies of the foregoing, along with replacement page 2 for the appendix and a disk, were mailed this ____ day of July, 2005, to: Douglas M. McMillan, City Attorney, City Hall, Suite 2800, 414 E. 12th Street, Kansas City, MO 64106, Attorney for Appellant and Paul A. Campo, Stinson Morrison Hecker, LLP, 1201 Walnut Street, Kansas City, MO 64106 , Attorney for Amicus Curiae.

Attorney